

DEAN K. DUNSMORE
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources
Division
801 B Street, Suite 504
Anchorage, Alaska 99501-3657
Telephone: (907) 271-5452
Facsimile: (907-271-5827
Email: dean.dunsmore@usdoj.gov

Attorney for United States

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

PAUL G. SHEARER)	
)	
Plaintiff,)	No. 3:03-cv-00263-JKS
)	(CONSOLIDATED)
V.)	
)	
UNITED STATES OF AMERICA,)	
DIRK KEMPTHORNE,)	RESPONSE OF THE UNITED
Secretary of the)	STATES IN OPPOSITION
Interior, the DEPARTMENT OF)	TO SHEARER'S MOTION TO
THE INTERIOR, the NATIONAL)	AMEND
PARK SERVICE.)	
)	
Defendants.)	

On November 20, 2006, Paul G. Shearer, plaintiff in Case No. 3:03-cv-00263-JKS and defendant in Case No. 3:03-00269-JKS, filed a combined "Plaintiff's Cross Motion for Partial Summary Judgment Re: Parcels 3, 14, 15, 20, and Request to Amend Complaint to Include Jurisdiction for Mining in the Parks Act, 16 U.S.C." To the extent that this motion was a motion for partial summary judgment, it has been docketed as Docket Entry No. 102. To the extent it is a motion for leave to amend his complaint, it has been docketed as Docket Entry No. 103. The United States responds herein to Shearer's motion to amend (Docket Entry No. 103).

Shearer moves for leave to amend his First Amended Complaint

(Docket Entry No. 21) filed on May 19, 2005, in Case No. 3:03-cv-00263-JKS. The United States opposes that motion and requests that it be denied.

Shearer's motion is not in compliance with the rules of this Court. Pursuant to D. Ak. LR 15.1(1), a party moving to amend a pleading "must attach the signed original and one copy of the amended pleading to the motion." Shearer does not attach his proposed amended pleading. This requirement is not a mere formality. Leave to amend a complaint may be denied where the proposed amendment would be futile. *Partington v. Bugliosi*, 56 F.3d 1147, 1162 (9th Cir. 1995); *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991). Absent the proposed amended complaint, neither the Court nor the United States can determine if a proposed amendment would be futile or is otherwise proper.^{1/}

Shearer states at page 2, that he wishes to add "to the Jurisdiction section" of the First Amended Complaint (Docket Entry No. 21): "the 'Mining in the Parks Act, 16 U.S.C. Secs. 1901, et seq. including the provision in 16 U.S.C. Section 1910.'" Currently the only basis for jurisdiction alleged in the First Amended Complaint ¶ 2, is section 120 of the Act of November 14, 1997, Pub. L. No. 105-83, 111 Stat. 1543, 1564-66. The facts alleged in the First Amended Complaint relate only to a claim brought under section 120 of the November 14, 1997. Therefore, there is no basis to add an allegation of jurisdiction

^{1/} Many of Shearer's claims have also been dismissed. Order (Docket Entry No. 78) filed April 3, 2006. Any new complaint should also reflect these dismissals.

under the Mining in the Parks Act.^{2/}

Finally, Shearer, over three years after the commencement of his action, seeks to potentially change the entire basis for his claims. Until now, the only jurisdictional basis asserted by Mr. Shearer has been that in section 120 of the Act of November 14, 1997, Pub. L. No. 105-83, 111 Stat. 1543, 1564-66. Complaint (Docket Entry No. 1) ¶ 2, filed on November 11, 2003, in Case No. A03-0263 Civil; First Amended Complaint ¶ 2. The parties have served and responded to extensive written discovery and filed and briefed dispositive motions based on the claims as asserted by Shearer under section 120 of the Act of November 14, 1997. Amendment of the complaint would now not only add further delay to the conclusion of this case, but also prejudice the United States which has expended considerable time, effort and resources in addressing Shearer's claims as ones brought under section 120 of the Act of November 14, 1997. It simply is too late for Shearer to play games with both this Court and the United States by changing a fundamental basis for his action. See *Schlacter-Jones v. General Telephone of California*, 936 F.2d 435, 443 (9th Cir. 1991):

^{2/} The only allegation of the First Amended Complaint that did not pertain to section 120 of the Act of November 14, 1997, are those found in paragraphs 197 through 223 of the First Amended Complaint. The claim or claims in those allegations have been dismissed. Order (Docket Entry No. 78) filed April 4, 2003, at 3, 5. Further, the events alleged in those paragraphs were not actions under the Mining in the Parks Act or of regulations issued to implement that act. Therefore, any claims stated in those paragraphs would not be within the limited scope of the Court's jurisdiction under 16 U.S.C. § 1910. They also would appear to be based on events that occurred in 1994, First Amended Complaint ¶ 201-203, and would be barred by operation of 28 U.S.C. § 2401(a).

The timing of the motion, after the parties had conducted discovery and a pending summary judgment motion had been fully briefed, weighs heavily against allowing leave. A motion for leave to amend is not a vehicle to circumvent summary judgment.

For the foregoing reasons, Shearer's motion to amend the First Amended Complaint should be denied.

Dated this 7th day of December, 2006.

S/ Dean K. Dunsmore
DEAN K. DUNSMORE
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
801 B Street, Suite 504
Anchorage, Alaska 99501-3657
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Attorney for the United States

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of December, 2006, a copy of the foregoing Response of the United States in Opposition to Shearer's Motion to Amend together with a proposed Order were served on the following by placing copies in a postage prepaid envelope, addressed to that person at the place and address stated below, and by depositing said envelope and contents in the United States mail at Anchorage, Alaska.

Paul G. Shearer
Kathryn A. McCready
1532 Meadows Drive
Lake Oswego, Oregon 97034

s/ Dean K. Dunsmore
Dean K. Dunsmore